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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 33

LOCAL UNION NO 25 OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, and the following, as individuals and representatives of said Local Union No. 25 of Boston, Massachusetts; EDWARD F. JENKINS, MICHAEL J. NORTON and WILLIAM J. MCCARTHY,

Petitioners,

v.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPERIOR COURT OF THE COMMONWEALTH OF MASSACHUSETTS

BRIEF FOR RESPONDENT

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Petitioners,

v.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,

Respondent.

BRIEF FOR RESPONDENT

Jurisdiction

The jurisdiction of this Court is invoked under the provisions of Title 28, U. S. C. 1257(3). (Act of June 25, 1948, c. 646, 62 Stat. 929.)

Constitutional and Statutory Provisions Invoked

Provisions of the Labor Management Relations Act of 1947, as amended (61 Stat. 136, 29 U. S. C. 141, et seq.).

in addition to those set forth by Petitioners, and the pertinent provisions of Massachusetts statutes (G. L. Ter. Ed.) c. 149, Sections 20C and 24, G. L. (Ter. Ed.) c. 214, Section 9A, G. L. (Ter. Ed.) c. 93, Section 2, are set forth in the Appendix to this brief, infra, pages (i to xiii).

Preliminary Statement

In this case, the Supreme Court granted certiorari limited to one question and transferred the cause to the summary calendar. This suggests the Court's concern with a relatively narrow issue. *United Construction Workers, etc.* v. *Laburnum Construction Corporation,* 347 U. S. 656, 659.

Respondent respectfully submits that Petitioners' brief does not appear to be directed specifically to the jurisdictional question before the Supreme Court. Only an abundance of caution constrains Respondent to reply to several contentions, advanced by Petitioners, which may be irrelevant or, at least, beyond the scope of the issues before this Court.

Summary of the Argument

1. There is no conflict of remedies and no issue of preemption present in this case. The Labor Management Relations Act of 1947, as amended (herein sometimes called the "Act" or the "Labor Act" or the "Taft-Hartley Law") does not apply to railroads or railroad employees. Congress did not intend to foreclose railroads from seeking relief in a state court, even where the railroad is the victim of an unfair labor practice, as defined by the Act. In any event, Respondent's application to the Labor Board for relief would have been futile.

2. There was no secondary boycott involved in this case because neither the means nor the object proscribed by Sec-

tion 8(b)(4)(A) of the Act were present (29 U. S. C. 158 (b)(4)(A)).

3. The Petitioners' strike and work stoppage violated a collective bargaining agreement between the Petitioner Union and the motor carriers, including New England Transportation Company (herein called the "New England"); the strike was intermittent and the picketing, ambulatory. Accordingly, the Petitioners' activities were not protected by Section 7 of the Act (29 U. S. C. 157).

POINT I

Railroads are entirely excluded from the Labor Management Relations Act; Congress did not intend to restrict railroads to the remedies and procedure prescribed by the Act.

Respondent believes that the basic issue to be resolved is whether a railroad which seeks injunctive relief against conduct by a union, apparently within the compass of the Act, is limited to the remedies and procedures prescribed by the Act.[1]

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[1] This issue, assumes, as Respondent contends (pp. 20 to 24, infra), that Petitioners' activities were not protected under Section 7 of the Act and that the Petitioners committed an unfair labor practice as defined in Section 8(b)(4)(A). Respondent submits, however, that there was no unfair labor practice present in this case. Hence, the petitioners' activities were neither protected nor prohibited by the Act. Consequently, even if railroads are governed by the Act, the Massachusetts State Court could enjoin picketing in aid of an object which violates the public policy and statutes of Massachusetts. *Giboney et al. v. Empire Storage & Ice Company*, 336 U. S. 490, *International, etc.* v. *Hanke*, 339 U. S. 470.

In the *United Construction Workers, etc.* v. *Laburnum Construction Corporation*, 347 U. S. 656, the right of the employer to file a charge with the Labor Board was recognized. However, since the Board had no power to award damages, the employer was free to maintain an action in the State court. While the absence of a

A review of the legislative history and an analysis of the statute demonstrates, compellingly, that the Act was not designed to, and does not, in fact, apply to railroads and railroad employees.

A. The legislative history of the Act discloses a Congressional intention to exclude railroads and railroad employees from the compass of the Act.

Railroads and their employees were subject to the provisions of the Railway Labor Act long before the adoption of the Wagner Act (49 Stat. 449, 29 U. S. C. 151 et seq.). Notwithstanding repeated amendments, Congress never incorporated into the Railway Labor Act a scheme of unfair labor practices or an administrative procedural system similar to that found in the Labor Act. It is evident that Congress not only intended to accord special statutory treatment to railroads, but to limit the powers of the administrative agencies established by the Railway Labor Act. Surely, a system of administrative procedure in cases involving railroads and their employees, similar to the one found in the Labor Act, could have been, but was not, accomplished by amendments to the Railway Labor Act. A Congressional design to supplement or supersede the Railway Labor Act by applying certain provisions of the Labor Act to railroads could have been, but was not, effected by specific language.[2]

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conflict of remedies explains the decision in that case, the significance of the opinion is this: if Congress did not intend to restrict employers to the remedies prescribed by the Act, an employer not subject to the Act may properly pursue a remedy in the State courts and the remedy before the Board is cumulative rather than exclusive. Thus, Section 10(a) of the Act specifically provides that the power of the Board "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law or otherwise" (29 U. S. C. 160(a)).

[2] This is illustrated by the language of Title II of the Labor Management Relations Act, as amended. Title II did not appear, in any form, in the Wagner Act. Section 212 states that Title II "shall not be applicable with respect to any matter which is subject to the pro-

The Labor Act, in its original and amended text, is instinct with a Congressional intention to exclude railroads from the jurisdiction of the Labor Board and the ambit of the Act. Thus, the Wagner Act specifically omitted railroads from the definition of "employer."[3]

Although the Labor Board, under the original Act, had never assumed jurisdiction over railway employees, Congress amended the definition of "employee" to avoid a possible, even if remote, conflict of interpretation by excluding "any individual employed by an employer subject to the Railway Labor Act." Section 2(3), 29 U. S. C. 152(3).

In the course of the debates on the Taft-Hartley law, the sponsors of the legislation affirmed that neither railroads nor railway labor were covered by the Wagner Act or the proposed amendments.[4]

The exclusion of railroads was not inadvertent. Experience with the Railway Labor Act proved its efficacy. There was, however, no legislation of a similar kind which regulated the vast body of employers and employees outside the railroad industry. To meet the need for a coherent and consistent labor policy, Congress enacted the Wagner Act. When Congress amended the Wagner Act, its purpose was not to supersede the Railway Labor Act or to bring new categories of employers and employees within the reach of the Labor Act, but to create a balance of bargaining power

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visions of the Railway Labor Act, as amended from time to time" (61 Stat. 156, 29 U. S. C. 182). The necessary implication from the language is that matters not covered by the Railway Labor Act but contemplated by Title II are subject to the provisions of Title II. No such language appears in Title I.

[3] The term "employer" * * * shall not include * * * any person subject to the Railway Labor Act, as amended from time to time * * * 29 U. S. C. 152(2).

[4] 93 Cong. Rec. 6658, 2 Legislative History of the Labor Management Relations Act, 1947 (hereafter referred to as "Leg. Hist."), p. 1571. In *Mobile Steamship Association*, 8 N. L. R. B. 1297, the Labor Board held that railroads were excluded from coverage under the Wagner Act.

between employees and employers, then subject to the Labor Act, and to impose restraints upon "certain practices by some labor organizations." 29 U. S. 151. Thus, Section 8 of the Wagner Act, proscribed employer unfair labor practices only. The Taft-Hartley law retained, with some change in subdivision (3), the text of the original section; it did not extend its application to employers other than, or in addition to, those covered by the Wagner Act. When subdivision (b) to Section 8 was added, listing a series of union unfair labor practices, the inhibitions of the new section 8(b) were limited to labor organizations, as originally defined in the Wagner Act.

Simply stated, the objective of the original and amended Labor Act was to establish a *limited* code of regulation, and by creating an administrative procedural system, to promote a national labor policy of *limited* ambit and to provide a limited category of remedies. Thus, an employer subject to the Act who seeks injunctive relief against an unfair labor practice committed by a union subject to the Act, must proceed before the Labor Board. The same employer, may, however, seek an award of damages in the state or federal courts for the precise conduct. *United Construction Workers, etc.* v. *Laburnum Construction Corporation, supra* (p. 3). Further, this employer may apply for injunctive relief in a state or federal court when the labor organization involved is, like a railroad union, beyond the reach of the Act.

It is a mistaken notion that the Act preempts the entire field of labor activity. The Act occupies only that area of industrial labor relations which is specifically embraced within the four corners of the statute. Railroads and railway unions are, as the Labor Board has held, beyond the scope of the Act and its remedial powers:

> "Our conclusion in this respect is buttressed by the separate treatment that Congress has historically accorded railroads, their employees and the organizations of their employees. In our opinion, a sudden contrary intent on the part of the Eightieth Congress should not

be inferred in the absence of a clear expression in the statute that such was the Congressional purpose. We find no suggestion of such a clear expression here. Indeed, the fact that the 1947 amendments changed the definition of employee by excluding persons 'employed by an employer subject to the Railway Labor Act' whereas no such exclusion was contained in the Wagner Act before amendments is, if anything, an expression of an opposite intention" (p. 361).

International Rice Milling, et al., 84 N. L. R. B. 36, 361.[5]

B. The text of the statute makes clear that the Act cannot and does not apply to railroads.

To contend that, under some circumstances, a railroad employer is restricted to the remedies under the Act is to suggest either a partial repeal, by implication, of the Railway Labor Act or that two distinct and separate statutes, like tenants-in-common, jointly occupy overlapping and undivided areas of the same field. Any such implication or conclusion is negated by the text of the Act.[6]

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[5] The Labor Board's construction of the Act was rejected by the Court of Appeals for the Fifth Circuit. *International Rice Milling Co., Inc.* v. *National Labor Relations Board*, 183 F. (2d) 21 (C. A. 5th). Although an appeal was taken to the Supreme Court, the issue of the Board's jurisdiction over a charge by a railroad under Section 8(b)(4)(A) was neither raised nor decided by the Court. 341 U. S. 665, 668-669. Upon remand, the Labor Board, in the case above, did issue a complaint, but the decision of the Court of Appeals does not touch the issue presented here.

[6] When Congress intended that the Act repeal or supersede the provisions of any other statute, it said so expressly. Thus, Section 15 of the Act provides: "Wherever the application of the provisions of Section 272 of Chapter 10 of the Act entitled 'An Act to establish a uniform system of bankruptcy throughout the United States,' approved July 1, 1898, and Acts amendatory thereof and supplementary thereto (U. S. C. Title II, Sec. 672) conflicts with the application of the provisions of this Act, this Act shall prevail: *provided*, that in any situation where the provisions of this Act cannot be validly enforced, the provisions of such other Acts shall remain in full force and effect." 61 Stat. 151, 29 U. S. C. 165.

The powers of the Labor Board and the rights and obligations of employers and unions are derived from, and described in Sections 7, 8, 9, 10 and 11 of Title I and Sections 301 and 303 of Title III.

Section 7 protects the rights of "employees" to self-organization and to engage in concerted activities, among other things. Since Section 2(3) specifically excludes railroad employees, Section 7 cannot, by definition, apply to railroad workers whose rights, of course, are protected by the Railway Labor Act.

Section 8(a) cannot apply to railroads because it defines the unfair labor practices of "an employer." Section 2(2) specifically excludes railroads from the definition of "employer." For reasons developed at length in this brief (pp. 9-16; infra). Section (8b) cannot be applied to railroads and railroad unions.

Section 9 which relates to representatives selected or designated for collective bargaining purposes, is manifestly inapplicable to railroads since this subject matter is covered by the Railway Labor Act. References in Section 9, to "employees", "labor organizations" and "an employer" confirms this conclusion.

Section 10, which is concerned with the prevention of unfair labor practices, is obviously inapplicable to railroads. Under Section 10, the Board "is empowered * * * to prevent any person from engaging in an unfair labor practice (listed in Section 8) affecting commerce." Clearly, the Board cannot prevent a railroad (even if it is a "person" under the Act) from committing an unfair labor practice under Section 8(a) for reasons already indicated and it cannot proceed against a railroad union for commission of acts proscribed by Section 8(b).

Section 11 which describes the investigatory powers is necessarily integrated with Sections 9 and 10, both of which do not apply to railroads.

Section 301(a) of the Act creates a federal right, in favor of an "employer" and a "labor organization", as defined in the Act, to institute suit for violation of labor contracts. Consequently, the right cannot be invoked by or against a railroad or a railroad union (Section 501, 29 U. S. C. 142).

Section 303(b) is ineffective if the labor organization engaged in the proscribed activity is not subject to the provisions of the Act. It is noteworthy that, unlike Section 301(a), Section 303(b) does not limit the right to sue for damages to employers and unions subject to the Act. "Whoever shall be injured" may maintain a suit. It may perhaps be argued that the jurisdiction of the district courts is original and exclusive,[7] if the person injured elects to sue at law for money damages. However, a suit for injunctive relief in a State court would not amount to a conflicting remedy and, absent the bar of the initial primary jurisdiction doctrine, the injured party may sue for an injunction.

There remains for analysis only Section 8(b) of the Act. Respondent contends that this section was neither intended to limit the remedies available to a railroad nor can it be so construed, as the *proviso* clause which modifies the whole of Section 8(b), unmistakably shows. The clause states:

> "That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer) if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees which such employer is required to recognize under this Act."

If Section 8(b) were intended to apply to railroads, then the proviso clause means that employees who refuse to enter a railroad's premises have no protection at all, or more significantly, are engaged in an unlawful activity.

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[7] *Association of Westinghouse Salaried Employees* v. *Westinghouse Electric Corporation*, 348 U. S. 368.

Simply stated, the proviso means that the employees of a neutral trucking company may lawfully refuse to enter upon the premises of a shipper whose employees are engaged in a strike ratified or approved by a labor organization whom the "employer is required to recognize under this Act."[8] Now, a refusal by the employees of a trucking company, for example, to enter a railroad yard, is unlawful, no matter what the nature of the strike and irrespective of ratification by a labor organization, because a railroad is required to recognize a labor organization under the Railway Labor Act and not the Taft-Hartley law. *Switchmens Union of North America* v. *National Mediation Board*, 320 U. S. 297. Accordingly if Petitioners' argument is sound, what Congress intended to protect would become an unprotected activity.

Obviously, if Section 8(b) applies to railroads, then a secondary boycott is not only an unfair labor practice, but refusal by employees to come upon the railroad's premises is unlawful. The Board has no procedures for dealing with this species of unlawful conduct and the railroad is free to seek any relief which may be available in state or federal courts.

Conceivably, a railroad may be victimized by a Section 8(b)(4)(A) secondary boycott.[9] This circumstance, how-

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[8] Agreements confirming or waiving the rights accorded to employees are lawful. *National Labor Relations Board* v. *Rockaway News Supply Company, Inc.*, 345 U. S. 71, 80.

[9] Under Section 8(b)(4)(A), a secondary boycott occurs when a labor organization induces the employees of a neutral employer to engage in a strike when the object is to force "any employer or other person" to cease doing business with "any other person." Thus, if New England Transportation Company is treated as a neutral employer, if the strike of New England's employees forced the respondent railroad to cease doing business with the motor carriers and if the railroad is considered to be within the class of "any employer" or "other person," then it may be argued that there was a secondary boycott and the respondent railroad was its victim. Does it follow, *a fortiori*, that the railroad was obliged, under these circumstances, to proceed before the Board for relief? An affirma-

ever, does not suggest that Section 8(b)(4)(A) and the procedure set forth in Section 10 apply to railroads.

To begin with, Section 8(b) speaks only of unfair labor practices committed by "a labor organization or its agents." A railroad union is not a "labor organization" as defined in Section 2(5). Since Section 8(b)(4) is a compound of means and objects, a railroad union can never be guilty of inducing a secondary boycott.

An attempt to circumscribe the rights of railroads by imposing the provisions of Section 8(b)(4) and Section 10 leads to absurdities indicated by the illustrations given here. These can be justified only by attributing irrationality to Congress.

Illustration No. 1: Section 8(b)(4)(A) makes it an unfair labor practice for a labor organization * * * to induce * * * the employees of any employer to engage in a strike * * * where an object thereof is: (A) forcing or requiring * * * any employer * * * to cease doing business with any other person.

Assume that a Railroad Union, in an effort to prevent the railroad from purchasing box-cars built under non-union conditions, induces railroad employees to strike, notwithstanding that there is no dispute between the Union and the railroad. The railroad is clearly a neutral employer victimized by a secondary boycott, the object of which is to force the railroad to cease doing business with the box car manufacturer. *National Labor Relations Board* v. *Washington-Oregon Shingle, etc.*, 211 F. 2d 149 (CA 9th). In this instance, the railroad has no remedy under the Labor

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tive answer presupposes that Congress intended that railroads and other persons otherwise expressly excluded from the operation of all other provisions of the Act, be covered only in the instance of a limited category of secondary boycotts. Surely, if this extraordinary exception were intended, explicit language could and would have been incorporated into the text of Section 8(b)(4)(A) and in Section 10 of the Act. But there is no such express statement in the Act.

Act because the union which induced the strike is not a labor organization as defined in Section 2(5) of the Act. However, since there is no labor dispute, injunctive relief could be sought, and probably secured, in the federal courts, or, at least, in the state courts.

When a labor organization, subject to the Labor Act induces employees of a neutral employer to engage in a strike with an object of forcing another employer to cease doing business with a railroad, the latter may be an "other person" referred to in Section 8(b)(4)(A). In this case, the railroad is a kind of third party victim of a secondary boycott. It seems clear that if the railroad qualifies as an "other person", the striking union has violated Section 8(b)(4)(A) and is probably subject to the sanctions of the Labor Act. But to suggest that the railroad is bound by the Labor Act because the union involved violated Section 8(b)(4)(A) means that in this rare case, the railroad has no remedy other than an unfair labor practice proceeding, despite the fact that when it is a direct victim, no such remedy or restriction exists.

Any distinction between the effect on the railroad when it is the direct or the remote victim, is metaphysical and not statutory. It means, in effect, that a railroad union can, with impunity, create protected secondary boycotts. The Act, then becomes a signal for lawlessness, or, at least, a document which completely emancipates railroad unions and other excluded labor organizations from regulation. Surely, Congress did not intend to provide a new technique for paralyzing the railroad industry in these circumstances, a state or federal court could intervene.

Illustration No. 2: Now, if a Railroad Union (PE)[10] having a dispute with a Railroad Employer (PR), pickets a railroad yard and thereby induces the employees of a truck-

[10] The symbols PE stand for Primary Employees, PR—Primary Employer, SE—Neutral Employees and SR—Secondary or Neutral Employers.

ing Company (SE) to engage in a concerted refusal to work, i.e., deliver ordinary freight to the railroad yard, in order to force the Trucking Company (SR) to cease doing business with the Railroad (PR), there appears to be a traditional secondary boycott. Here, indeed, the railroad union did, in fact, "induce the employees of a neutral secondary employer to engage in a strike" with the object of forcing the neutral employer "to cease doing business with any other person" (Railroad), but this cannot be a secondary boycott under Section 8(b)(4)(A) since the Railroad Union is not a "labor organization" as defined in Section 2(5) of the Act.

If the Labor Act applies, railroad unions may freely induce secondary boycotts and railroads would have no remedy before the Labor Board, and, perhaps no other avenue of relief.

Illustration No. 3: If the facts in Illustration No. 2 are reversed so that a Union representing employees (PE) of the Trucking Company (PR) induces railroad workers (SE) to engage in a strike in order to force the Railroad (SR) to cease doing business with the Trucking Company, there appears to be, once again, a traditional secondary boycott. Here a labor organization as defined in the Act (PE), did induce "the employees of any employer" (Railroad) "to engage in a strike" with the object of "forcing or requiring any employer" (Railroad) "to cease doing business with any other person" (Trucking Company).

Obviously, this is not a secondary boycott under Section 8(b)(4)(A) because employees of a railroad are not "employees" as defined in Section 2(3) of the Act.

Here, too, if the Labor Act applies, a Union of employees subject to the Act, may, without restraint, create a secondary boycott if the inducement is limited to employees who are not employees under the Act.

Illustration No. 4: Section 8(b)(4)(D), like 8(b)(4)(A), proscribes secondary activity. It is, accordingly, "an un-

fair labor practice for a labor organization * * * to engage, in a strike * * * when an object thereof is * * * (D) forcing or requiring an employer to assign work to employees in a particular labor organization or in a particular * * * craft * * * rather than to employees in another labor organization or in another * * * craft."

If a dispute arises between porters and trainmen over the work of inspecting brake apparatus, and a trucking union induces its employees to refuse to deliver freight to the railroad in order to force the railroad to assign the disputed work to the trainmen, there appears to be a violation of Section 8(b)(4)(D) if the statutory words "any employer" includes railroads for, in this case, a labor organization subject to the Act (Trucking Union) did induce "employees of any employer" (Trucking Company) "to engage in a strike" with the object of "forcing or requiring any employer" (Railroad) "to assign particular work" to porters, i.e., "a particular * * * craft." To apply Section 8(b)(4)(D) and Section 10 would create a hiatus in the regulatory scheme because the dispute between the porters and the trainmen cannot be resolved by the Labor Board. *Missouri-Kansas Texas R. Co., et al.* v. *Randolph, et al.*, 164 F. (2d) 4 (C. A. 8th), cert. den. 334, U. S. 818; *Illinois Cent. R. Co.* v. *Brotherhood of Railroad Trainmen, Order of Ry. Conductors of America*, 83 F. Supp. 930 (D. C. Ill.).[11]

If the Labor Board attempted to assert jurisdiction in such a case and, following a proceeding under Section 10(k) made an outright award of the disputed work,[12] it

[11] The situation is not theoretical. There are railroad unions affiliated with the C.I.O. and with the A.F.L. and cooperation between other affiliated unions, outside the railroad industry, with the railroad unions has occurred. The answer, however, is clear: railroad unions cannot be subject to the restraints imposed by Section 8(b)(4)(D). *General Committee, etc.* v. *Missouri Kansas-Texas Railroad Company, et al.*, 320 U. S. 323, 334; *General Committee, etc.* v. *Southern Pacific Company*, 320 U. S. 338.

[12] Of course, the usual practice in such cases is for the Labor Board to rule that the actions of one of the unions is unlawful and

would preempt the powers of the National Railroad Adjustment Board under the Railway Labor Act.[13]

While additional illustrations can be provided, they serve only to prove what is self-evident, namely, that Congress did not intend either a complete or piece-meal application of the Labor Act to railroads.

There is a rational basis for the special treatment which Congress has accorded to railroads and their employees. In all other industries, prior to the enactment of the Taft-Hartley law, the boundaries of allowable industrial conflict expanded or contracted with changes in the contemporary political temper and economic climate. In the federal courts, the Norris-LaGuardia Act operated as a bar against injunctive relief. In the state courts, neutral employers covered by the Labor Act, were not protected against secondary strikes and boycotts in aid of objects now proscribed by the Taft-Hartley law. The miscellany of the state court decisions in cases of secondary boycotts called for a uniform and coherent body of legal principles which the Taft-Hartley law attempts to provide. To be sure, railroads had been the victims of secondary action.

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state that its ruling was not to be construed as assigning the work. Injunctive relief, under Section 10(e) may be secured or ultimately, an enforcement proceeding may be instituted in the appropriate Circuit Court.

[13] Act of May 20, 1926, c. 347, Section 2, 44 Stat. 577; June 21, 1934, c. 691, Section 2, 38 Stat. 1146, 45 U. S. C. 151 et seq. It may be noted, too, that in many respects the Taft-Hartley and Railway Labor Act cover substantially the same subject matter. In some areas, there are different regulatory measures. Thus, the Labor Board has no jurisdiction with respect to the enforcement or interpretation of collective bargaining agreements, whereas the National Railroad Adjustment Board, 4th Division, has such power. (Section 153(h).) On the other hand, the Labor Board may, under some circumstances, secure an injunction. The Railway Labor Act makes no provision for injunction and no right for injunctive relief for violations of the Railway Labor Act is conferred upon any administrative agency.

But in cases where a railroad has been impeded in the performance of its statutory duty as a common carrier, relief was obtained in the state and federal courts. *Northwestern Pac. R. Co.* v. *Lumber & Sawmill Workers' Union etc.*, 31 Cal. (2d) 441, 189 P. 2d, 277; *Pacific Gamble Robinson Co.* v. *Minneapolis & St. L. Ry. Co.*, 83 F. Supp. 860, 85 F. Supp. 65 (D. C. Minn.).

In cases involving railroads which were litigated since the enactment of the Taft-Hartley Law, federal and state courts granted relief against secondary action. *Illinois Cent. R. Co.* v. *International Brotherhood of Teamsters, etc.*, 90 F. Supp. 640 (D. C. W. D. La.) (1950); *Montgomery Ward & Company, Inc.* v. *Northern Pacific Terminal Company of Oregon, et al.*, 23 Labor Cases (CCH) ¶ 67,713, (D. C., Dist. of Oregon); *Erie Railroad* v. *Longshoremen's Assn.*, 33 LRRM 2234 (D. C., Western Dist. of N. Y.); *Terminal R. Ass'n of St. Louis* v. *International Association of Machinists, et al.*, 333 Ill. App. 288, 77 N. E. 2d 448; *Millmen Union, Local 324, A. F. L., et al.* v. *Missouri-Kansas-Texas R. Co. of Texas*, 253 S. W. 2d 450; *Stewart et al.* v. *State*, 221 Ark. 496, 254 S. W. 2d 55; *Louisville & N. R. Co.* v. *Local Union No. 432 of International Woodworkers of America*, 104 F. Supp. 748.

C. There was no secondary boycott involved in this case.

Respondent has assumed, for the purposes of its argument, that there was a secondary boycott as defined by the Labor Act and that the Respondent railroad was the victim.[14]

The record discloses that New England, together with the other motor carriers, was a party to a single and uniform

[14] Petitioners state that there was no secondary boycott (p. 16 Petitioners' brief). Except for the fact that Respondent is conscious of a duty to this Court to explore the facts and the law on this aspect of the case, the extended discussion which follows would be unnecessary. If the Petitioners' concession is sufficient for the purposes of this appeal and if this Court relies upon this concession, then Re-

labor contract with the Union (R. 143). The Union's avowed object was to induce all motor carriers under contract with it, including New England, to limit or eliminate their piggy-back operations.

Indeed, if New England is treated as a neutral employer, there was no secondary boycott under Section 8(b)(4)(A) because the object of the Petitioner Union's activities was not proscribed by Section 8(b)(4)(A). To begin with, the declared object of the strike was to secure a portion, or all, of the work handled by the Respondent. This is not prohibited by Section 8(b)(4)(A) even though it is not protected under Section 7.[15]

In *Douds* v. *International Longshoremen's Association, et al.*, 224 F. (2d) 455 (C. A. 2d), secondary strike activity which had as its objective, control of the Port of New York, was held not to constitute a secondary boycott within the meaning of Section 8(b)(4)(A). Judge Learned Hand pointed out that:

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spondent's discussion in Point I (A) and (B) and Point II of this brief (pp. 20 to 24, *infra*) adequately treats the contentions urged by the Petitioners. Incidentally if, as Petitioners contend, the Union was engaged in a primary dispute with New England, the inducement of the motor carrier employees including the employees of New England could not create a secondary boycott, since there was no inducement of neutral employees. *International Rice Milling Company* v. *National Labor Relations Board*, 341 U. S. 645; *International Brotherhood of Electrical Workers, etc.* v. *National Labor Relations Board*, 341 U. S. 694; *National Labor Relations Board* v. *Denver Building and Construction Trades Council, et al.*, 341 U. S. 675; *National Labor Relations Board* v. *Washington-Oregon Shingle, etc.*, 211 F. 2d 149 (C. A. 9th).

[15] The respondent does not concede that a strike to secure all or portions of the transportation business and to thereby effect a monopoly of such work may be lawfully bargained for or may be the lawful object of a strike or peaceful picketing. The term "labor dispute" as defined in Section 2(9) of the Act is not as broad as in the Norris-LaGuardia Act (29 U. S. C. 113). A strike to compel an employer to discontinue the use of labor saving machinery or to compel discontinuance of a more efficient method of production does not give rise to a labor dispute. *Opera-on-Tour, Inc.* v. *Weber*, 285 N. Y.

"When Congress limited the wrong to occasions when the cessation was an 'object' to the conduct, it excluded much indeed that the ordinary law of tort would have included" (p. 459).

Accordingly, unless a secondary strike has for its object the promotion of the general solidarity of unionism either by making common cause with the employees of any other employer engaged in a strike or by bringing pressure to bear on a neutral employer in order to force him to boycott a product, the secondary action is not prohibited under Section 8(b)(4)(A).

D. An application for relief by the railroad would have been futile.

The fact that a charge of an unfair labor practice could have been filed by the motor carriers or even by the railroad is not dispositive of, or relevant to, the issue in this case.[16]

The cardinal inquiry is not whether the respondent railroad could have filed a charge and proceed before the Labor Board, but whether the Respondent was obliged to institute proceedings before the Labor Board and was precluded from applying to the Massachusetts courts for relief. It cannot be disputed, for example, that in an instance where the United States Government may be guilty of anti-union discrimination, a charge may be filed but the Gov-

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348, cert. den. 314 U. S. 615. The Union's conduct is not thereby rendered lawful or protected. Thus, a sit-down strike may not give rise to a boycott and although the striking union is not guilty of an unfair labor practice, the strike is unlawful and not protected.

[16] The Union relies upon the Rules and Regulations of the National Labor Relations Board, 29 C. F. R. Supp. 102.9, 16 F. R. 1937, March 1, 1951, respecting the filing of charges. But the union fails to note that when the Labor Board in the *International Rice Milling* case, supra, n. 5, refused to process a charge by a railroad, the rules in effect at that time provided: "Section 203.9; Who may file; withdrawal and dismissal. A charge that any person has engaged in or is engaging in any unfair labor practice, affecting commerce may be made by any person." (12 F. R. 5656.)

ernment may not be compelled to submit to a Labor Board investigation. So, too, if the United States Government is a victim of a secondary boycott, it may, perhaps, file a charge with the Labor Board but this does not imply or suggest that the Government is either required to file a charge or that the sole forum for relief is the Labor Board. *In the Matter of International Brotherhood of Electrical, etc., and Al J. Schneider*, 87 N. L. R. B. 99, 89 N. L. R. B. 221.

At the time when the Petitioners interfered with the Respondent's business, the Labor Board had announced that it would not be bound by the decision of the Court of Appeals in *International Rice Milling* case, supra, n. 5. *In re International Brotherhood of Electrical Workers, Local 5 etc. and Victor M. Sprys d/b/a Sprys Electric Company*, 104 N. L. R. B. 1128.

Essentially, the whole structure of a claim that a secondary boycott may be invoked against the railroad rests on a tenuous construction of the words "other person" found in Section 8(b)(4)(A).

Respondent contends that the word "person" is generic and applies to those persons who are subject to the provisions of the Labor Act.[17]

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[17] There appears to be no conflict of opinion that the Government is not a person under the Labor Act. The distinction between the Government and any other employer, based on the word "person" is specious. If "person" means "anybody" or "any agency," then it applies with equal force to the Government and the railroad. In many regulatory acts where the term "person" is defined and the Government is not specifically included, this Court has treated the Government as a "person" for certain purposes. *Far East Conference, etc.* v. *United States of America, et al.*, 340 U. S. 570, 576. *United States of America* v. *Public Utilities Commission of the State of California, etc.*, 345 U. S. 295, 312-316.

Moreover, the distinction between a private corporation such as Respondent and a governmental agency does not exist in the instance of a wholly owned government corporation. Neither the United States Goverment nor a governmental corporation was explicitly excluded from the definition of "person" in Section 2(1).

In any event, the Board had declared that it will not take jurisdiction of a case involving a railroad nor process a charge by a railroad. Apart from the fact that the Board had no jurisdiction, it is evident that an attempt to process the case before the Board would have been futile. In these circumstances, Respondent was free to seek injunctive relief in the state courts relieved of the inhibitions of the Norris-LaGuardia Act. The decision by the Massachusetts courts that the granting of an injunction did not violate the Massachusetts statutes is, of course, binding on this Court. Indeed, there being no labor dispute as defined in the Norris-LaGuardia Act, an injunction might have been secured in the federal court upon a properly pleaded complaint.[18] Certainly, if pursuit of an administrative remedy is futile, an injured party may seek relief in the courts.[19]

POINT II

The Union's activity was not protected concerted activity under Section 7 of the Labor Management Relations Act, as amended.

Petitioners' claim that the strike and the picketing at Respondent's yard were protected concerted activities is plainly lacking in merit. A brief review of two relevant facts makes this evident.

The union and the motor carriers, including New England, were parties to a master collective bargaining agreement which did not prohibit "piggy-back" operations (R. 126-127). Petitioners contend, however, that there was a

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[18] *Illinois Cent. R. Co.* v. *International Brotherhood of Teamsters, etc.*, 90 F. Supp. 640 (D. C. W. D. La.); *Louisville & N. R. Co.* v. *Local Union No. 432, etc.*, 104 F. Supp. 748 (D. C. S. D. Ala.); *In Re Texas Electric Bus Lines and Brotherhood of Railroad Trainmen*, 100 N. L. R. B. 67, it was held: "The Board does not have jurisdiction over an employer subject to the Railway Labor Act."

[19] See discussion pp. 25 to 26, infra.

current primary dispute between the Union and the motor carriers concerning "piggy-back" operations. Although this alleged dispute had been discussed by the Union with representatives of the motor carriers, it had never been submitted for decision in accordance with the grievance and arbitration procedure established by the Labor agreement (R. 128, 136, 137). Indeed, the president of the Petitioner union and Petitioner McCarty testified that the Union could properly by-pass the grievance machinery and engage in a strike or other methods of self-help (R. 150, 162, 167-168).[20]

Secondly, the motor carriers who were involved had terminals in Boston (R. 108, 213, 215) but picketing and the work stoppage occurred at the railroad yard. The work stoppage was intermittent so that certain piggy-back operations continued without interruption (R. 70, 71, 183, 165-166).

The strike and the picketing violated the labor contract and these activities, though perhaps concerted, were not protected. Petitioners cannot escape this fundmental principle unless they misread Section 7 of the Act, as indeed they do. Petitioners incorrectly assume that Section 7 was intended only to describe the allowable areas of collective bargaining. This specious notion is the springboard for Petitioners' argument that if a Union may lawfully bargain to secure all or part of the work performed by others, any activity in aid of this bargainable issue is protected, if concerted. The difficulty with Petitioners' analysis is that Section 7 deals with methods and objectives so that an activity which is carried on in an unlawful way to achieve a lawful goal, or an activity carried on by lawful means

[20] Petitioner McCarthy testified that there had been one arbitration case involving one of the trucking companies (R. 164), but this concerned a failure to accord a work opportunity to two drivers previously assigned for work (R. 168) and had nothing to do with the broad issue of the right of drivers to transport trailers then carried by piggy-back (R. 169).

to accomplish an unlawful objective is not protected, even if it is concerted. Unless both the method and objective are lawful, the activity is not protected. Union activity is either fully protected or completely unprotected; Congress did not enact a hybrid class of protected objective—unprotected method activities.

A strike for higher overtime wage rates is, in certain instances, a protected concerted activity. But if the strike violates an existing collective bargaining agreement or other unlawful means are employed, it ceases to be a protected activity under Section 7. *C. G. Conn, Limited* v. *National Labor Relations Board*, 108 F. (2d) 390 (7th C. A.); *National Labor Relations Board* v. *Sands Manufacturing Company*, 306 U. S. 332; *National Labor Relations Board* v. *Draper Corporation*, 145 F. (2d) 199 (C. A. 4th); *Southern Steamship Company* v. *National Labor Relations Board*, 316 U. S. 31.[21]

So, too, a strike called in defiance of a contractual grievance procedure is not a protected concerted activity under Section 7. *In re W. L. Mead, Inc. and Local 25, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, A. F. of L.*, 113 N. L. R. B. No. 109, 36 LRRM 1392.[22]

In the *Mead* case, Mr. McCarthy (one of the Petitioners here) refused to submit a dispute to arbitration and, instead, called a strike. The Union contended there, as it

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[21] See, too, *National Labor Relations Board* v. *Fansteel Metallurgical Corporation*, 306 U. S. 240; *B.V.D. Company, etc.*, 110 N. L. R. B. 1412; *Pacific Telegraph & Telephone Company*, 107 N. L. R. B. 1547; *Longview Furniture Company, etc.*, 110 N. L. R. B. 1734; *Honolulu Rapid Transit Company, etc.*, 110 N. L. R. B. 1806. H. Conf. Rep. No. 510, 80th Cong. 1st Sess. 39, 1 Leg. Hist. 543 and 93 Cong. Rec. 6442 in 2 Leg. Hist. 1539.

[22] The *Mead* case involved this Union, one of the individual Petitioners and a collective bargaining agreement with a grievance procedure identical with the one at bar.

does here, that because of the absence of a no-strike clause, its strike was a protected concerted activity under Section 7.

A unanimous Labor Board declared the strike to be "a material breach of a clear and binding contractual arbitration clause" and completely unprotected.

When the Petitioner Union, in the case at bar, violated the labor contract by resorting to a strike and picketing and thereby disregarded the grievance and arbitration procedure, its activity was not protected. Moreover, the partial and intermittent character of the work stoppage [23] as well as the ambulatory nature of the picketing carried on by the Petitioner Union were beyond the ambit of Section 7.[24]

Petitioners compound their error of construction by an error in logic. Thus, they argue that activities which are not prohibited by the Act are necessarily protected.[25]

In International Union, U. A. W. etc. v. Wisconsin Employment Relations Board, 336 U. S. 245, the Supreme Court said:

> "We think that this recurrent or intermittent unannounced stoppage of work to win unstated ends was neither forbidden by federal statute nor was it legalized and approved thereby" (pp. 264-265).

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[23] Picketing was limited as to time; some vehicles were loaded into flat cars (R. 70) and contrary to the Petitioners' contention, trailers operated by at least one carrier under contract were loaded onto the flat cars (R. 153, 165).

[24] *International Union, U. A. W. etc. v. Wisconsin Employment Relations Board*, 336 U. S. 245; *Sterling Beverages, Inc.*, 90 N. L. R. B. 401; *Amalgamated Meat Cutters, etc. (Western, Inc.)*, 93 N. L. R. B. 336; *Washington Coca-Cola Bottling Works*, 107 N. L. R. B. 299; *Thurston Motor Lines, Inc.*, 110 N. L. R. B. 748; *Gotham Broadcasting Corporation*, 110 N. L. R. B. 2166.

[25] In *Association of Westinghouse Salaried Employees v. Westinghouse Electric Corp.*, 348 U. S. 437, 443 (footnote 7) it was pointed out that a breach of contract is not an unfair labor practice and rights and obligations incident to such contracts must be left to the ordinary processes of the law and not to the Labor Board.

POINT III

The Massachusetts Court was free to act since the Union's activity was neither protected by Section 7 nor prohibited by Section 8(b)(4).

Even if it be assumed that the Board has jurisdiction over railroads, the Respondent railroad, in this instance, was free to institute suit in the Massachusetts courts. It has already been demonstrated that the activity engaged in by the Union was not protected nor prohibited by the Act. Accordingly, the Massachusetts Court could properly act to enforce the laws of Massachusetts.[26] *International Union, U. A. W. etc.* v. *Wisconsin Employment Relations Board*, 336 U. S. 245.

Petitioners' contention that the Labor Board's jurisdiction is exclusive so long as interstate commerce is involved is supported neither by legislative history nor decisional precedent.[27] Neither legislative history nor the text of the Labor Act supports any implication that Congress excluded all state controls over secondary activity which does not constitute an unfair labor practice under the Act.

As Mr. Justice Frankfurter, in *Bethelehem Steel Company* v. *New York State Labor Relations Board*, 330 U. S. 767, said:

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[26] The Supreme Judicial Court of Massachusetts is the final arbitrator of the meaning of Massachusetts statutes and the federal courts are bound by its construction. *State of Louisiana ex rel., Willie Francis* v. *Resweber*, 329 U. S. 459, 461-462; *Aero Mayflower Transit Company* v. *Board of Railroad Commissioners of the State of Montana*, 332 U. S. 495, 499; *Independent Warehouses, Inc.* v. *Scheele*, 331 U. S. 70, 86-87; *Moore* v. *Illinois Central Railroad Company*, 312 U. S. 630, 633-634.

[27] It is true that *Garner* v. *Teamsters, etc.*, 346 U. S. 485 suggests that if the commerce facts bring the case within the jurisdiction of the Labor Board, a state court is precluded from acting notwithstanding that the action is neither protected nor prohibited by the Act. But that this was dictum is made clear by subsequent decisions of the Supreme Court.

> "Since Congress can, if it chooses, entirely displace the States to the full extent of the far-reaching Commerce Clause, Congress needs no help from generous judicial implications to achieve the supersession of State authority" (p. 780).

That the preemption doctrine is limited to instances where two similar remedies, one state and one federal, are brought to bear on precisely the same conduct is made evident by the decision in *United Construction Workers etc.* v. *Laburnum Construction Corporation*, 347 U. S. 656 and later in *Weber et al.* v. *Anheuser-Busch, Inc.*, 348 U. S. 468.

In the latter, the decision seems to rest primarily on the question of whether the conduct is protected or prohibited by the Labor Act. This is indicated by the fact that the cases cited consist of three categories: those which hold that the State may not prohibit the exercise of rights which the Labor Act protects; those which hold that a State may no enjoin conduct which has been made an unfair labor practice under the Labor Act and those which support the State's right to deal with conduct not subject to regulation by the Labor Board, either by prohibition or protection.[28]

At best, the Labor Board's jurisdiction is merely primary. Primary jurisdiction, as distinguished from the exhaustion doctrine, involves only the question of initial decision, and it implies concurrent administrative and judicial jurisdiction. *Texas & Pacific Railway Company* v. *Abilene Cotton Oil*, 204 U. S. 426. The failure by an administrative agency to exercise its jurisdiction clears the path to judicial action.

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[28] The issue of futility raised, in part by *Building Trades Council* v. *Kinard Construction Co.*, 346 U. S. 933, is treated elsewhere in this brief. While this Court has indicated that the pleadings may persuasively raise the issue of the Labor Board's exclusive jurisdiction and Petitioners expatiate at length in this aspect of respondent's pleadings (p. 25 of Petitioners' Brief), the Respondents, on the trial, did abandon all claims under the Act (R. 307) and at the conclusion of trial moved to amend the pleadings to conform to the proof. In this motion, Petitioners joined (R. 296). Under Massachusetts law, such a motion effects a sufficient amendment of the pleadings. Mottla, *Massachusetts Practice—Civil* (Rev. Ed. 1948), Section 267, pp. 160-163.

The rejection by the Labor Board of a charge is the final step in the administrative process and the refusal of the Board to issue a complaint on the basis of a charge over which it rejects jurisdiction is not reviewable by any court. *General Drivers, etc. Local 886, etc.* v. *National Labor Relations Board*, 179 F. (2d) 492 (CA 10th); *Lincourt* v. *National Labor Relations Board*, 170 F. (2d) 306 (C. A. 1st).[29]

If administrative relief is impossible or improbable, there is no duty to resort to the agency or to exhaust its remedies. *Aircraft & Diesel Equipment Corporation* v. *Hirsch et al.*, 331 U. S. 752. *Smith, etc.* v. *Illinois Bell Telephone Company*, 270 U. S. 587, 591; *Order of Railway Conductors, etc.* v. *Swan, etc.*, 329 U. S. 520; *Union Pacific Railroad Company* v. *Board of County Commissioners, etc.*, 247 U. S. 282; *Hillsborough etc.* v. *Cromwell*, 326 U. S. 620; *Marino* v. *Ragen*, 332 U. S. 561; *City Bank Farmers Trust Company* v. *Schnader*, 291 U. S. 24.

CONCLUSION

For all of the reasons set forth in this brief, it is respectfully requested that this Court dismiss the petition for writ of certiorari or, in the alternative, affirm the decree of the Massachusetts Superior Court.

Respectfully submitted,

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HERBERT BURSTEIN,
of Counsel.

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[29] This accords with decisions under the Wagner Act holding that courts have no jurisdiction to review the action of the Board in exercising its discretion to issue a complaint. *National Labor Relations Board* v. *Indiana & Michigan Electric Company*, 318 U. S. 9; *National Labor Relations Board* v. *Barrett Co.*, 120 F. (2d) 583 (7th C. A.); *National Labor Relations Board* v. *National Broadcasting Co., Inc.*, 150 F. (2d) 895 (C. A. 2d); *National Labor Relations Board* v. *Federal Engineering Co.*, 153 F. (2d) 233 (C. A. 6th).

APPENDIX

The pertinent provisions of the Labor Management Relations Act (61 Stat. 136, 29 U. S. C. 141, et seq.), are as follows:

* * * * * *

Sec. 2. When used in this Act—

* * * * * *

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

* * * * * *

(5) The term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

* * * * * *

Sec. 8(a). It shall be an unfair labor practice for an employer: * * *

* * * * * *

Sec. 8(b)(6). It shall be an unfair labor practice for a labor organization or its agents—

* * * * * * *

to cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction, for services which are not performed or not to be performed.

* * * * * * *

Sec. 9(a).

(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further,* That the bargaining representative has been given opportunity to be present at such adjustment.

* * * * * * *

Sec. 11. For the purpose of all hearings and investigations, which, in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by sections 9 and 10 * * *.

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Sec. 15. Wherever the application of the provisions of section 272 of chapter 10 of the Act entitled "An Act to establish a uniform system of bankruptcy throughout the United States", approved July 1, 1898, and Acts amendatory thereof and supplementary thereto (U. S. C., title 11; sec. 672), conflicts with the application of the provisions of

this Act, this Act shall prevail: *Provided,* That in any situation where the provisions of this Act cannot be validly enforced, the provisions of such other Acts shall remain in full force and effect.

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Sec. 212. The provisions of this title shall not be applicable with respect to any matter which is subject to the provisions of the Railway Labor Act, as amended from time to time.

* * * * * * *

Sec. 301(a). Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

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Sec. 303(a). It shall be unlawful, for the purposes of this section only, in an industry or activity affecting commerce, for any labor organization to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is—

(1) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person;

(2) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor or-

ganization has been certified as the representative of such employees under the provisions of section 9 of the National Labor Relations Act;

(3) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9 of the National Labor Relations Act;

(4) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class unless such employer is failing to conform to an order or certification of the National Labor Relations Board determining the bargaining representative for employees performing such work. Nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under the National Labor Relations Act.

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(b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) may sue therefor in any district court of the United States subject to the limitations and provisions of section 301 hereof without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit.

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Massachusetts Statutes G.L. (Ter. Ed.) c. 149

SECTION 20C For the purposes of this and the preceding section, section twenty-four of chapter one hundred and forty-nine, sections one, nine and nine A of chapter two hundred and fourteen, and sections thirteen A and thirteen B of chapter two hundred and twenty.

(a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft or occupation; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is (1) between one or more employers or associations of employers and one or more employees or associations of employees; (2) between one or more employers or associations of employers and one or more employers or associations of employers; or (3) between one or more employees or associations of employees and one or more employees or associations of employees; or when the case involves any conflicting or competing interests in a "labor dispute" (as hereinafter defined) of "persons participating or interested" therein (as hereinafter defined).

(b) A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it, and if he or it is engaged in the same industry, trade, craft or occupation in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft or occupation.

(c) The term "labor dispute", when used in the sections hereinbefore referred to, includes any controversy arising out of any demand of any character whatsoever concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange, terms or

conditions of employment, regardless of whether the disputants stand in proximate relation of employer and employee.

(d) Except as provided in subsection (e) of this section, the term "lawful labor dispute" includes any controversy concerning:

(1) The association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange, terms or conditions of employment;

(2) The recognition of bargaining status of a labor organization;

(3) Rates of pay, wages, hire or tenure of hours of employment, or working conditions;

(4) The execution or performance of an agreement to arbitrate an existing or future labor dispute;

(5) The execution or performance of a collective bargaining agreement containing any lawful provision of a kind commonly found in collective bargaining agreements (including but not limited to any provision requiring as a condition of employment membership in a labor organization which is the exclusive representative of the employees in the appropriate collective bargaining unit covered by such agreement when made); or

(6) Any term or condition of employment which has heretofore been regarded as a lawful objective of concerted activities on the part of employees or labor organization.

The foregoing definition shall be applicable regardless of whether the disputants stand in the proximate relation of employer and employee, but shall not be deemed to include any "unlawful labor dispute" or "unlawful secondary boycott" as defined ~~in the~~ following subsections:

(e) The term "unlawful labor dispute" includes any controversy arising out of a demand—

(1) That an employer commit a criminal offense or unfair employment practice in violation of chapter one hundred and fifty-one B or unfair labor practice either in violation of chapter one hundred and fifty A, or in the violation of the National Labor Relations Act;

(2) That an employer include in a collective bargaining agreement any provision the execution or performance of which would be unlawful;

(3) That an employer recognize or bargain collectively with any labor organization as the representative of its employees in any bargaining unit while another labor organization is the representative of such employees certified by the labor relations commission established by section nine O of Chapter twenty-three, or by the National Labor Relations Board, prior to the time said commission, or board, would conduct a new investigation and certification of representatives.

(4) That an employer recognize or bargain collectively with any labor organization as the representative of its employees in any bargaining unit within one year after the labor relations commission established by section nine O of chapter twenty-three has determined in a proceeding under section five of chapter one hundred and fifty A that such employees do not desire to be represented by such labor organization; or.

(5) Made by any party to a jurisdictional dispute as defined in section nine B of chapter two hundred and fourteen who has failed to abide by any voluntary arbitration procedure applicable to such dispute or to comply with the terms of the arbitration award.

(f) The term "unlawful secondary boycott" means any strike, slowdown, boycott or concerted cessation of work or withholding of patronage or services, arising out of a labor dispute, where an object thereof is to force or require any person not otherwise engaged in such labor dispute to cease using, selling, handling, transporting, or dealing in

the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; provided, however, that a secondary boycott may be lawfully directed at a person the greater part of whose current business over a representative period is processing, selling, handling, transporting or otherwise dealing in the goods of an employer primarily interested in a lawful labor dispute or who, by any agreement, understanding or arrangement with such employer, is requiring his own employees to perform work or services which would be done by the employees of such employer in the absence of a labor dispute (1950, 452, §§ 1, 2, appvd. May 11, 1950; effective 90 days thereafter).

Sec. 24. Peaceful Persuasion Not Penalized. No person shall be punished criminally, or held liable or answerable in any action at law or suit in equity, for persuading or attempting to persuade, by printing or otherwise, any other person to do anything, or to pursue any line of conduct not unlawful or actionable or in violation of any marital or other legal duty, unless such persuasion or attempt to persuade is accompanied by injury or threat of injury to the person, property, business or occupation of the person persuaded or attempted to be persuaded or by disorder or other unlawful conduct on the part of the person persuading or attempting to persuade, or is a part of an unlawful labor dispute or unlawful secondary boycott; or is a part of an unlawful or actionable conspiracy and not a part of a lawful labor dispute, nor for attending in the course of a lawful labor dispute, at any place, where such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating, information or of so persuading or attempting to persuade. (1913, 690; 1933, 272, appvd. June 16, 1933, 1950, 452, Sec. 4 appvd. May 11, 1950; effective 90 days thereafter.)

G. L. (Ter. Ed.) c. 214

Section 9A Injunctions in Labor Disputes (1) No court shall have jurisdiction to issue a preliminary or permanent

injunction in any case involving or growing out of a labor dispute, as defined in section twenty C of chapter one hundred and forty-nine, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, it offered, and except after findings of fact by the court, to the effect—

(a) The unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained, but no injunction or temporary restraining order shall be issued on account of any threat or unlawful act excepting against the person or persons, association or organization making the threat or committing the unlawful act or actually authorizing or ratifying the same after actual knowledge thereof;

(b) That substantial and irreparable injury to the complainant's property will follow;

(c) That as to each item of relief granted greater injury will be inflicted upon the complainant by the denial of relief than will be inflicted upon the defendants by the granting of relief;

(d) That the complainant has no adequate remedy at law; and

(e) That the public officers charged with the duty to protect the complainant's property are unable or unwilling to furnish adequate protection.

(2) Such hearing shall be held after due and personal notice thereof has been given, in such manner as the court shall direct, to all known persons against whom relief is sought, and also to the chief of those public officials of the city or town within which the unlawful acts have been threatened or committed charged with the duty to protect the complainant's property; provided, however, that if a complainant shall also allege that, unless a temporary restraining order shall be issued without notice, a substantial

and irreparable injury to the complainant's property will be unavoidable, such a temporary restraining order may be issued upon testimony under oath, sufficient if sustained, to justify the court in issuing a preliminary injunction upon a hearing after notice, and a statement of the grounds justifying the issuance of such order shall be made a matter of record by the court; provided, further, that no such temporary restraining order shall be issued except upon its also being made to appear to the satisfaction of the court (either from the testimony of witnesses or from written assurances filed by counsel in regard to his personal conduct)—

(A) That a principal representative or attorney of the employees or labor organization participating in such dispute was informed of the time and place at which the application for a temporary restraining order would be presented sufficiently in advance to appear in opposition thereto; or

(B) That the complaint made every reasonable effort to comply with paragraph (A) but was unable so to do; provided, however, that notification by mail alone shall not be deemed compliance with this section without proof of receipt.

Such testimony or written assurances shall set forth in detail the manner in which the complainant complied with paragraph (A) or (B) and shall be made part of the record in the case. If the defendants appear in opposition to the application for a temporary restraining order they shall be afforded an opportunity to cross-examine the complainant's witnesses at such length as is reasonable under the circumstances and a like opportunity to introduce evidence in opposition thereto. Such a temporary restraining order shall be effective for no longer than five days and shall become void at the expiration of said five days and shall not be subject to renewal. No temporary restraining order or preliminary injunction shall be issued except on condition

that the complainant shall first file an undertaking with adequate security in an amount to be fixed by the court sufficient in its opinion to recompense those enjoined for any loss, expense or damage caused by the improvident or erroneous issuance of such order or injunction, including all reasonable costs (together with a reasonable attorney's fee) and expense of defense against the order or against the granting of any injunctive relief sought in the same proceeding and subsequently denied by the court.

(3) The undertaking herein mentioned shall be understood to signify an agreement entered into by the complainant and the surety upon which a decree may be rendered in the same suit or proceeding against said complainant and surety, upon a hearing to assess damages of which hearing the complainant and surety shall have reasonable notice, the said complainant and surety submitting themselves to the jurisdiction of the court for that purpose. But nothing herein contained shall deprive any party having a claim or cause of action under or upon such undertaking from electing to pursue his ordinary remedy by action at law or suit in equity.

(4) No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or, who has failed to make every reasonable effort to settle such dispute, either by negotiation or with the aid of any available governmental machinery or mediation or voluntary arbitration.

(5) No restraining order, other than a temporary restraining order issued without notice as provided in subdivision (2) of this section, and no preliminary or permanent injunction shall be granted in a case involving or growing out of a labor dispute, except on the basis of findings of fact made and filed by the court in the record of

the case prior to the issuance of such restraining order or injunction; and every restraining order or injunction granted in a case involving or growing out of a labor dispute shall include only a prohibition of such specific act or acts as may be expressly complained of in the bill of complaint or petition filed in such case and as shall be expressly included in said statement of grounds or findings of fact made and filed by the court as provided herein.

(6) Whenever the court shall issue or deny a preliminary injunction in a case involving or growing out of a labor dispute, the court, upon the request of any party to the proceeding, shall forthwith report any questions of law involved in such issue or denial to the supreme judicial court and stay further proceedings except those necessary to preserve the rights of the parties. Upon the filing of such report, the questions reported shall be heard in a summary manner by a justice of the supreme judicial court, who shall with the greatest possible expedition affirm, reverse or modify the order of the superior court. The decision of such justice of the supreme judicial court upon the questions so raised shall be final, but without prejudice to the raising of the same questions before the full court upon exceptions, appeal or report after a final decree in the case. (1935, 407 § 4, appvd. July 12, 1935; 1950, 452, § 3, appvd. May 11, 1950; effective 90 days thereafter.)

G.L. (Ter. Ed.) c. 93

Section 2. Monopolies and Discrimination in the Sale of Articles, etc., in Common Use Prohibited. Every contract, agreement, arrangement, combination or practice in violation of the common law whereby a monopoly in the manufacture, production, transportation or sale in the commonwealth of any article or commodity in common use is or may be created, established or maintained, or whereby competition in the commonwealth in the supply or price of any such article or commodity is or may be restrained, or

prevented or whereby, for the purpose of creating, establishing or maintaining a monopoly within the commonwealth of the manufacture, production, transportation or sale of any such article or commodity, the free pursuit in the commonwealth of any lawful business, trade or occupation is or may be restrained, or whereby the price of any article or commodity in common use is or may be unduly enhanced within the commonwealth, is hereby declared to be against public policy, illegal and void.